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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

TRIYAR HOSPITALITY  
MANAGEMENT, LLC,

Plaintiff and Appellant,

v.

WSI (II) - HWP, LLC et al.,

Defendants and  
Respondents.

2d Civil No. B276243  
(Super. Ct. No. 56-2015-  
00462600-CU-BC-VTA)  
(Ventura County)

This appeal arises from a contract to purchase a hotel. At the heart of the dispute is a hotel management agreement. The purchaser did not discover until after it allowed the purchase contract to terminate that the management company had failed to exercise its option to renew. The purchaser alleged that the management agreement was so favorable to the management company that its termination added \$11 million to the value of the hotel. The purchaser sued the seller and the management company, alleging causes of

action, including breach of contract, fraud, negligent misrepresentation and promissory estoppel. The trial court found in favor of the defendants. We affirm.

#### FACTS

WSI (II) - HWP, LLC (WSI) owns a hotel in Thousand Oaks. WSI had a hotel management agreement with Hyatt Corporation (Hyatt). The original term of the management agreement was 15 years. The agreement gave Hyatt five options to renew for five years each. To exercise an option, Hyatt had to give at least 18 months' notice prior to the expiration date. On March 25, 2009, Hyatt exercised its second option, extending the term to December 31, 2015. The deadline for Hyatt's next renewal notice was June 30, 2014.

On May 23, 2014, Triyar Hospitality Management, LLC (Tiyar) entered into an agreement with WSI to purchase the hotel for \$39 million. The purchase contract was expressly subject to Hyatt's management agreement.

The purchase contract provided for a period of "due diligence" during which Triyar could investigate matters related to the sale, including the management agreement. The period would end on July 3, 2014. The purchase contract provided that the contract would terminate on that date at 5:00 p.m. Eastern time unless Triyar gave WSI written notice of its election not to terminate.

WSI contends the management agreement was very favorable to Hyatt. The fees charged under the agreement were well over those that Hyatt could obtain in the current market for hotel management services. Triyar alleges the management agreement reduced the value of the hotel by \$11 million. The \$39 million purchase price was based on the assumption that the

management agreement would remain in place. It is undisputed that Hyatt failed to timely exercise its option to renew its management agreement beyond December 31, 2015. What is disputed is whether Hyatt or WSI realized this during the due diligence period.

WSI requested Hyatt to assist in preparing an assignment of the management agreement to Triyar. On June 2, 2014, Hyatt's attorney, Karrie Dowd, spoke on the telephone with Triyar's chief executive officer, Michael Mahoney, and its vice president, Paula Pfleuger. Dowd agreed to prepare a draft assignment of the management agreement. She sent the draft to Mahoney and Pfleuger on June 12, 2014. Triyar did not respond until June 30, 2014, when it sent Dowd a revised draft.

With the July 3, 2014, due diligence deadline looming, Triyar asked WSI for an extension. In order to confirm Triyar was proceeding in good faith, WSI asked Triyar to provide a status report on Triyar's efforts to secure financing for the purchase. Triyar designated Dan Michaels as its contact person. Michaels requested an update from his loan broker on the status of Triyar's loan. The lender, G.E. Capital, replied by e-mail that it expected an application to be issued by July 17, 2014. Before forwarding the e-mail to WSI, Michaels changed the word "issued" to "completed," thus indicating that the lender expected the application to be completed, not simply issued, by July 17, 2014. Based on the misrepresentation contained in the forwarded e-mail, WSI granted Triyar an extension of the due diligence period to July 17, 2014.

On July 8, 2014, Dowd spoke with Mahoney and Pfleuger on the telephone about the June 30 draft of the management agreement assignment. The assignment as drafted

by Triyar included an estoppel provision to be executed by WSI and Hyatt. Dowd suggested that the estoppel provision be placed in a separate agreement. Triyar did not object. Dowd told Pfleuger and Mahoney that she planned to send them the assignment and estoppel certificate by July 11, 2014. Neither Pfleuger nor Mahoney informed Dowd of the July 17, 2014, due diligence deadline. Dowd was unable to complete the draft by July 11, 2014.

On July 16, 2014, Dowd sent Triyar a draft estoppel certificate. The e-mail accompanying the draft stated, "Attached is the draft mutual estoppel for Purchaser's and Owner's review. It remains subject to my client's review and comments. I am working to complete and confirm the information. Please let me know if you have any comments on the form."

The draft estoppel certificate contained blanks for the date on which the current term of the management agreement would expire and the number of renewal options remaining.

On the afternoon of July 17, 2014, Triyar contacted WSI to request an extension of time to complete its due diligence. WSI agreed to the extension on the condition that Triyar pay a \$100,000 good faith nonrefundable deposit. Triyar refused and allowed the purchase contract to terminate by its own terms.

After the purchase contract terminated, Triyar learned that Hyatt did not make a timely exercise of its option to renew its management agreement. Triyar alleged that Hyatt and WSI were aware during the due diligence period that Hyatt had failed to timely exercise its option and concealed that fact from Triyar. Hyatt and WSI deny that they were aware. Triyar claims that had it known Hyatt failed to exercise its option,

Triyar would have waived all other contingencies and purchased the hotel.

WSI's real estate agent maintained an on-line "data room" in which documents relevant to the sale were posted and available to Triyar. The data room contained Hyatt's management agreement, as well as two prior renewal notices from 2004 and 2009. Pfleuger downloaded the information after the June 30, 2014, deadline for Hyatt to exercise its option. When asked whether she noticed there had been no renewals subsequent to the ones she downloaded, Pfleuger replied, "Yes. I guess I would have. I wasn't looking for a renewal notice. I wasn't -- I wasn't focused -- we were told it's a long-term agreement. I was not focused on the June 30th date."

No one from Triyar specifically asked WSI or Hyatt whether Hyatt had exercised its option.

#### *Procedure*

Triyar's original complaint named WSI and Wheelock Street Capital, LLC, WSI's parent company (collectively WSI), but not Hyatt. The complaint alleged causes of action for specific performance, breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, negligent misrepresentation, unjust enrichment and injunctive relief. The trial court overruled the demurrer to the cause of action for unjust enrichment, but sustained with leave to amend WSI's demurrer to all other causes of action.

Triyar's first amended complaint added Hyatt as a defendant. In addition to realleging the same causes of action against WSI, the first amended complaint included causes of action against Hyatt for fraud and negligent misrepresentation. The fraud and negligent misrepresentation causes of action

alleged against WSI and Hyatt were based on the July 16, 2014, e-mail and blank estoppel certificate.

The trial court sustained WSI's demurrer only to the cause of action alleging unjust enrichment. The trial court sustained Hyatt's demurrer to the first amended complaint in its entirety without leave to amend.

The trial court reconsidered and allowed Triyar to file a second amended complaint. Triyar alleged causes of action against WSI for specific performance, breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and negligent misrepresentation. The second amended complaint alleged causes of action against Hyatt for fraud, negligent misrepresentation and promissory estoppel. The fraud and negligent misrepresentation causes of action against WSI and Hyatt were based on an alleged promise by Hyatt's counsel, Dowd, made in a July 8, 2014, telephone call to provide information to Triyar about the management agreement.

WSI answered the complaint. Hyatt demurred. The trial court overruled Hyatt's demurrer on the fraud cause of action, but sustained the demurrer on all other causes of action. The court granted Triyar leave to amend its cause of action alleging promissory estoppel by noticed motion.

The trial court denied Triyar's motion for leave to file a third amended complaint. Hyatt obtained summary judgment on the sole remaining cause of action for fraud. WSI obtained summary adjudication on the causes of action alleging fraud and negligent misrepresentation.

Triyar voluntarily dismissed its causes of action for breach of contract and breach of the covenant of good faith and fair dealing, leaving only Triyar's cause of action for specific

performance. The parties went to trial on the specific performance allegation.

After trial, the trial court found that WSI had fulfilled its obligations under the contract and the purchase fell through due to Triyar's own failure to meet its deadline for conducting due diligence. In addition, the court found that Triyar's representative Michaels's "duplicitous behavior" in obtaining an extension of time for Triyar to complete its due diligence breached the implied covenant of good faith and fair dealing. The court gave judgment to WSI.

## DISCUSSION

### I

Hyatt contends Triyar has forfeited the right to challenge the trial court's ruling sustaining Hyatt's demurrer to the first amended complaint.

Initially, the trial court sustained Hyatt's demurrer to the fraud and misrepresentation causes of action contained in the first amended complaint without leave to amend. Later the trial court reconsidered and allowed Triyar to file its second amended complaint, amending these causes of action.

The election to amend the complaint after a demurrer has been sustained waives any error in the ruling sustaining the demurrer. (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 866.) Triyar counters that the rule does not apply where the trial court denied plaintiff leave to include the allegations of the prior complaint in the amended complaint. (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1372.)

But the exception on which Triyar relies applies to causes of action on which the trial court has sustained a

demurrer without leave to amend. (See *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 208-209.) Here the trial court granted Triyar leave to amend its causes of action alleging fraud and misrepresentation, and Triyar elected to do so. Triyar cannot now challenge the trial court's ruling sustaining Hyatt's demurrer to those causes of action contained in the first amended complaint.

In any event, Triyar's challenge to the trial court's rulings sustaining Hyatt's demurrers on both the first and second amended complaints lacks substantive merit.

## II

Triyar contends it stated viable causes of action for fraud and negligent misrepresentation based on the July 16, 2014, e-mail and draft estoppel certificate.

Those causes of action were alleged in Triyar's first amended complaint. As we have stated, Triyar forfeited its right to challenge the trial court's ruling sustaining Hyatt's demurrer to those causes of action. In any event, the function of a demurrer is to test whether, as a matter of law, the facts alleged in the complaint state a cause of action under any legal theory. (*Intengan v. BAC Home Loans Servicing, LP* (2013) 214 Cal.App.4th 1047, 1052.) We assume the truth of all facts properly pleaded, as well as facts of which the trial court properly took judicial notice. (*Ibid.*) But we do not assume the truth of contentions, deductions or conclusions of law. (*Ibid.*) Our review of the trial court's decision is de novo. (*Ibid.*)

The elements of a cause of action for fraud are: (1) misrepresentation, including concealment or nondisclosure; (2) knowledge of falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) damage. (5 Witkin, Summary of Cal. Law (11th

ed. 2017) Torts, § 890, p. 1218.) The elements of negligent misrepresentation are the same except that it does not require knowledge of falsity. (*Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 231.)

Justifiable reliance not only requires actual reliance, but the circumstances must be such that it was reasonable for plaintiff to accept defendant's statements without an independent inquiry or investigation. (5 Witkin, *supra*, Torts, § 933, p. 1271.) In determining whether reliance was justified, the plaintiff's knowledge and experience must be considered. (*Ibid.*) Ordinarily, justifiable reliance is a question of fact, but it may be decided as a question of law if reasonable minds can come to only one conclusion. (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 132.)

In essence, Triyar alleged that it relied on an e-mail stating that the attached estoppel certificate is a draft, subject to the sender's client's review and comments, and stating that the sender is working to confirm the information. In addition, Triyar alleges it relied on the draft estoppel certificate with the crucial date on which the management agreement would expire and the number of renewal options remaining left blank. But that is the very reason the e-mail and the blank estoppel certificate could not be relied on. Despite this missing information, Triyar claims it reasonably relied on the information to conclude that Hyatt had made a timely exercise of its option to renew its management agreement and that the agreement was viable long-term.

Given that Triyar entered into a \$39 million contract, it is fair to ascribe to it a high degree of business sophistication. Yet Triyar alleges it relied on an e-mail full of disclaimers and a blank certificate as the linchpin of its decision not to purchase the

hotel. That Hyatt was unwilling or unable to provide Triyar with definitive information about the management agreement should have put Triyar on notice that there might be a problem. No one from Triyar asked Hyatt whether it timely exercised its option to renew the management agreement. Triyar argues in its opening brief that Hyatt was highly motivated to conceal its failure to exercise its option. That should have been obvious to Triyar all along. There was no justifiable reliance as a matter of law.

Triyar characterizes the July 16 e-mail and draft as fraud by conduct. It cites *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 839, for the proposition that fraud may arise from conduct that is designed to mislead. But even if an e-mail and draft certificate can be construed as conduct, there is still the missing element of justifiable reliance.

Triyar argues that misleading partial statements can give rise to fraud. Triyar relies on *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1082-1083.) In *Randi W.*, the defendants wrote letters recommending a vice principal for employment without disclosing his history of child molesting. The court determined that plaintiff, who was molested by the vice principal, stated causes of action for fraud and negligent misrepresentation.

But, unlike this case, the letters in *Randi W.* were not accompanied by an advisement that the letters are a draft subject to review and comment by others, and that the letter writers are working to complete and confirm the information. Nor did the letters contain blank spaces for essential information to be supplied later.

In an attempt to show reasonable reliance, Triyar points to evidence it submitted in opposition to Hyatt's motion for summary judgment. The evidence is not helpful to Triyar.

A Triyar vice president declared:

"When we received the Mutual Estoppel Certificate with the blanks in it, we were very concerned. We had no idea if there were any side agreements between WSI and Hyatt or amendments to the Management Agreement. We needed to get the information about the status of and renewal terms remaining in the Management Agreement before we could make an informed decision as to whether to proceed with the purchase of the Hotel.

". . . It would not have been a responsible business practice to enter into a transaction of this magnitude without assurance of the status and renewal terms of the Management Agreement. There is no way we could have even considered assuming the Management Agreement without knowing its term. . . .

". . . Once we received the Mutual Estoppel Certificate with the blanks, we were one day away from the end of our Feasibility Period. Having tried to get this information from Hyatt for more than two weeks, we had no choice but to seek an extension of time so that we could get this information, and to close out our due diligence."

The declaration in essence admits that Triyar did not rely on the July 16, 2014, e-mail and estoppel certificate to conclude Hyatt's management agreement would be in place long-term. Instead, the declaration states that the blank estoppel certificate caused Triyar to seek more information about the status of the management agreement. Seeking more information

is not reasonable reliance. (See 5 Witkin, *supra*, Torts, § 890, p. 1218 [for justifiable reliance, circumstances be such that it was reasonable to accept defendant's statements without independent inquiry or investigation].)

### III

Triyar contends the trial court erred in denying it leave to file its third amended complaint.

Triyar's second amended complaint contained a cause of action for promissory estoppel. The cause of action was based on what Triyar characterizes as the "July 8 promise" in which Hyatt's counsel allegedly acknowledged it was "the plan" to provide Triyar with the information it needed on the status of the management agreement within a week.

The trial court sustained Hyatt's demurrer to that cause of action on the ground that the complaint alleged Hyatt was acting as WSI's agent and a known agent is not liable on a contractual or quasi-contractual claim.

Triyar's proposed third amended complaint sought to avoid the trial court's ruling through the simple expediency of alleging Hyatt was not WSI's agent. This was in spite of having alleged Hyatt was acting as WSI's agent in the first three complaints.

The trial court's denial of leave to amend a complaint is reviewed for abuse of discretion. (*M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1534.) The trial court did not abuse its discretion here.

First, where a proposed pleading directly contradicts allegations of a prior pleading, the trial court may deem the proposed pleading a sham and deny leave to amend. (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020,

1043, fn. 25.) Here, not only did Triyar consistently allege that Hyatt was acting as WSI's agent in prior complaints, Triyar alleges that Hyatt was acting as WSI's agent in causes of action other than promissory estoppel in the third amended complaint. Triyar argues it is permissible to plead in the alternative. True enough, but not where the pleading is a sham.

Second, although the policy is to liberally allow amendments to pleadings, the amendments must stop at some point. The third amended complaint amounts to an \$11 million search for a cause of action.

Third, the proposed amendment fails to state a cause of action. The elements of a promissory estoppel claim are “ ‘(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.’ ” (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901.)

Here the third amended complaint fails to allege reasonable reliance. Triyar claims that Hyatt's July 8, 2014, promise was to provide information on the management agreement by July 11, 2014. After July 11, 2014, Triyar knew Hyatt breached its promise. If there was any lingering doubt, it would have been dispelled on July 16, 2014, when Hyatt sent Triyar a blank estoppel certificate with an e-mail stating Hyatt was working to complete and confirm the information. Triyar alleges the breach of Hyatt's promise caused it to forego its purchase of the hotel. But Triyar did not forego purchasing the hotel until after it knew Hyatt had breached its promise. Triyar cannot reasonably rely on a promise it knew had been breached prior to the alleged reliance. In fact, Triyar's statement that it

sought an extension of time to obtain the information is an admission that it did not rely.

IV

Finally, Triyar contends WSI is liable for negligent misrepresentation based on Hyatt's conduct and promissory estoppel based on Hyatt's agency relationship.

Triyar's lack of reasonable reliance on Hyatt's alleged misrepresentation and promise precludes liability.

The judgment is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Vincent J. O'Neill, Jr., Judge

Superior Court County of Ventura

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